SUPREME COURT, U. S.

Supreme Court, U. S.
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IN THE SUPREME COURT OF THE UNITED STATES

NO. 75-862

WILLIAM HENRY INGRAM,

Petitioner

vs.

THE STATE OF GEORGIA

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

PETITION ON BEHALF OF WILLIAM HENRY INGRAM, PETITIONER

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IN THE SUPREME COURT OF THE UNITED STATES

_____ TERM, 1975

NO. _____

WILLIAM HENRY INGRAM, PETITIONER

vs.

THE STATE OF GEORGIA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

Petitioner requests that a Writ of Certiorari issue to review the decision of the Supreme Court of the State of Georgia (No. 30227) denying Petitioner's Application for a Writ of Certiorari to the Court of Appeals of the State of Georgia which was entered on September 17, 1975.

Petitioner shows to the Court that he timely filed his Motion for Re-Hearing of the Supreme Court of Georgia's denial

of his Application for a Writ of Certiorari to the Court of Appeals of Georgia on September 25, 1975. Petitioner further shows that the Supreme Court of Georgia denied his Motion for Re-Hearing on the 30th day of September, 1975.

OPINION BELOW

Petitioner's Application for a Writ of Certiorari filed in the Supreme Court of Georgia was based upon the decision of the Court of Appeals of Georgia, which upheld Petitioner's conviction for Robbery by Intimidation in its Opinion of May 12, 1975. Petitioner timely filed his Motion for Re-Hearing with the Court of Appeals of Georgia, which was denied on June 4, 1975. The Opinion of the Court of Appeals of Georgia of May 12, 1975, and the notification received by Petitioner's attorneys setting

forth the Court of Appeals' denial of Petitioner's Motion for Re-Hearing, dated June 4, 1975, appear in the Appendix to this Petition.

The September 17, 1975, decision of the Supreme Court of the State of Georgia was rendered without an Opinion and will not be reported. The denial of Petitioner's Motion for Re-Hearing in the Supreme Court of Georgia, dated September 30, 1975, was also rendered without an Opinion and will not be reported. The notification received by Petitioner's attorney from the Supreme Court of Georgia concerning its September 17, 1975, and September 30, 1975, decisions appear in the Appendix to this Petition.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

Whether the Court below was correct in holding:

1. The evidence at trial was sufficient to support a charge of conspiracy;
2. That Petitioner was not prejudiced by the denial of his Motion to Sever in the Trial Court;
3. The statement made by Petitioner was voluntarily made, and admissible at trial

because Petitioner was given all of the "Miranda" warnings at the proper time;

4. The Trial Judge did not abandon his role of impartiality during the trial;

5. The Trial Judge did not commit error during the sentencing of Petitioner;

6. That the Prosecutor's comments during trial did not constitute error.

STATUTORY PROVISIONS INVOLVED AND CONSTITUTIONAL PROVISIONS INVOLVED

1. The Fifth Amendment to the Constitution of the United States which reads:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken

for public use, without just compensation.

2. The first section of the Fourteenth Amendment to the United States Constitution, which reads:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny

to any person within its jurisdiction the equal protection of the laws.

3. Georgia Code Annotated Section 26-506 (c), which reads:

> (c) When two or more crimes are charged as required by subsection (b), the court in the interest of justice may order that one or more of such charges be tried separately.

The remaining provisions of Georgia Code Annotated Section 26-506, Sections "a" and "b" are printed in the Appendix infra, at page 93 .

4. The pertinent provision of Section 27-2101, Georgia Code Annotated, reads:

> When two or more defendants are jointly indicted for a capital offense, any defendant so electing shall be separately tried unless the State shall waive the death penalty; when indicted for a capital felony when the death penalty is waived or for a felony less than capital, or for a misdemeanor, defendants may be tried jointly or separately in the discretion of the trial court.

The remainder of Georgia Code Annotated, Section 27-2101 appears in the Appendix, infra at page 95 .

5. Section 27-2503(a), Georgia Code Annotated, as it applies to this

case, reads:

> Except in cases in which the death penalty may be imposed, upon the return of a verdict of "guilty" by the jury in any felony case, the judge shall dismiss the jury and shall conduct a presentence hearing at which the only issue shall be the determination of punishment to be imposed. In such hearing the judge shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere of

the defendant, or the absence of any prior conviction and pleas: Provided, however, that only such evidence in aggravation as the State has made known to the defendant prior to his trial shall be admissible.

The remainder of Section 27-2503(a), Georgia Code Annotated appears in the Appendix infra, at page 97 .

6. The Sixth Amendment to the Constitution of the United States which reads:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have

been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

I. BACKGROUND:

On the night of February 11, 1974, the Petitioner in company with four other males visited a house rented by the deceased, Gordon Biggers and James Dorminy. Both Biggers and Dorminy were seniors at Baker High School. (T-16) The house was in the Holly Hills area of Columbus and here Biggers and Dorminy engaged in the sale of narcotics. (T-16-17) They sold both marijuana, hashish and other drugs of abuse to students at Baker High School along with other prospective purchasers. On the afternoon of that date two of the males who returned later; namely, Winchester (alias "Slim") and Harvey King, had visited the house and had purchased hashish in the amount of $12.00 each.

On this particular Monday night the deceased and Dorminy had been to a pot party (T-54) from about 6:00 P.M. until approximately 9:00 P.M., at which time they returned to the house because they had an appointment with Havey King to sell him some hashish. (T-55) This appointment was made at Baker High School. The witness, Dorminy, had been on drugs including LSD, since at least 1972. The drugs that they sold were imported from Florida. (T-56)

"Slim" and King first came to the door and Biggers told Dorminy that they had a sale for some marijuana; that there were two black guys at the door who wanted to make a buy and there were three more guys out in the car. (T-18) When Dorminy brought the marijuana into the living room all five males had entered by that time. All seven of the

occupants sat around smoking marijuana, then King asked for a glass of water and followed Dorminy into the kitchen. They were trying out the marijuana before buying it. (T-19) King called to one of the other males to come into the kitchen. The other male was identified in Court as a Co-defendant, Joe Louis Bradley. (T-21) Bradley was identified as the male who produced a gun while in the kitchen, and who came into the living room with it and ordered Biggers and Dorminy to get down on the floor. He hit Dorminy over the head with the gun and then "they" hit Gordon over the head, then "they" asked for money. Subsequently, (T-22) Bradley was identified as the only individual with a gun and as the one who did the hitting. After that, "someone", not identified, hit Biggers with a bottle (T-23) and taped Dorminy's legs. The witness,

Dorminy, did not know who produced the tape. (T-25) Nothing was said by anyone during this incident (T-28) involving the gun. During most of this time the witness, Dorminy, was lying on the floor face down.

Thereafter, someone took two speakers and a stereo after the beating. (T-31) Dorminy thought that the speakers were taken while all five of the males were present, although because of his position on the floor face down he could see only the feet of persons in the house. (T-31-32) After this incident, Dorminy first called his father and then the police were called; and Biggers was subsequently removed to the hospital where he expired on or about the 20th day of February, 1974. The cause of death was established as blows to the head resulting in skull fracture with hemorrhage. (T-109)

Shortly after the expiration of Biggers, two detectives of the Columbus Police Department, Hicks and Bettis, attempted to contact the Petitioner, Ingram. They had earlier secured an identification of one Harvey King from Dorminy. (T-118) Hicks and Bettis came to the home of the Petitioner, Ingram, on February 21, 1974. (T-120) Bettis had been at the house earlier and left his card, and Ingram returned his call by phone. The two detectives went to Ingram's home and questioned him about Harvey King. King had previously been identified as one of the five black males involved in the incident of February 11, 1974. (T-117-118) Ingram admitted he knew Harvey King and that the previous weekend he had taken him to Huntsville, Alabama. At this time Hicks "invited" Ingram to come to police headquarters. (T-121) Upon arrival at headquarters Hicks

told Ingram he had a warrant for Murder and Armed Robbery (T-122) involving Harvey King. Ingram became extremely nervous, began sweating and twisting his hands. Hicks did not give him any warning as to his rights; instead he asked him what he knew about Harvey King. (T-122-123) After several more questions Ingram blurted out that he was "at the house that night". (T-126) Then and only then, Detective Hicks, according to Hicks, advised him of his rights. (T-216) According to Ingram it was when he was served with a warrant about 11:30 P.M. (T-176) that he was first advised of his rights. Ingram had previously asked for his mother, and a minister (T-214) and a lawyer. (T-173-174) His mother was called and came to Headquarters. Neither the minister or lawyer was called. (T-174-214) Ingram eventually made a verbal statement and

it was vigorously contended that this statement was involuntary and inadmissible. (T-185)

The trial resulted in an acquittal by the Jury as to Ingram of all charges, but a finding of Guilty as to Robbery by Intimidation.

II. PROCEEDINGS BELOW:

1.

The original decision and Judgment in the Court of Appeals of Georgia in the case of William Henry Ingram, Appellant (Petitioner) versus The State of Georgia, Appellee (Respondent), the same being Case Number 50305 in the Court of Appeals of Georgia was rendered and filed on the 12th day of May 1975, said Judgment affirming the Judgment of the Trial Court that the Petitioner was convicted of

robbery by intimidation on July 11, 1974, and sentenced to ten years in the penitentiary on July 12, 1975. Subsequently, and within ten days, William Henry Ingram, filed his Motion for Re-Hearing which was denied on June 4, 1975.

2.

Within ten days after the filing of the Judgment of the Court of Appeals of Georgia dated June 4, 1975, the Petitioner gave written notice to the Clerk of the Court of Appeals of Georgia of his intention to apply to the Supreme Court of Georgia for a Writ of Certiorari in said case. A copy of such Notice was attached thereto and made a part thereof.

3.

The application for the Writ was filed with the Clerk of the Supreme Court of Georgia within thirty days from the filing of said Judgment

in the Court of Appeals of Georgia in the said case.

4.

On the 17th day of September 1975, the Supreme Court of Georgia denied the Petitioner's Application for a Writ of Certiorari.

5.

Within ten days, on September 25, 1975, the Petitioner filed his Motion for Re-Hearing on his Application for Certiorari with the Supreme Court of Georgia. That Court denied his Motion on September 30, 1975.

REASONS FOR GRANTING THE WRIT

All references to the Transcript herein are keyed to the Transcript from the Muscogee County Georgia Superior (Trial) Court.

I. PETITIONER'S CONSTITUTIONAL RIGHTS TO A FAIR TRIAL AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WERE DENIED BECAUSE THE TRIAL JUDGE ABANDONED HIS ROLE OF IMPARTIALITY AND BECAME PROSECUTOR.

In the past twenty years the Supreme Court of the United States has attacked one after the other evils existing in the administration of criminal justice throughout the United States. They have overturned conviction after conviction which resulted

from the overzealous, artful and at times meretricious conduct of police officers, public prosecutors and other officials charged with enforcement of the law. Miranda v. Arizona, 384 U.S. 436 (1966); Gideon v. Wainwright, 372 U.S. 335 (1963); Escobedo v. Illinois, 378 U.S. 478 (1964), and others have become milestones in judicial history.

In all this time, however, there is one very substantial evil that the Supreme Court of the United States has never excoriated, and that is the interference in a criminal trial by the Trial Judge who becomes prosecutor instead of remaining an impartial arbiter. In the case at hand the Trial Judge simply could not forget the days when he was an experienced and able prosecutor and it is respectfully submitted

that his continued assistance to the young District Attorney trying this case turned the scales against the Petitioner, Ingram. The most glaring instances probably occurred when the Trial Judge blatantly ignored the recommendation of the jury which brought in a conviction on the least serious offense (one not charged but as the Judge took special pains to point out in his instruction a lesser included offense) that he exercise leniency, and again when he listened to rumor, report and Courthouse gossip in sentencing this Petitioner, disregarding the young man's outstanding record in school as a STAR student, cadet Lt. Col. commanding an ROTC Unit and complete lack of any criminal record.

Even according to the Court of Appeals of Georgia, the Trial Judge "interrupted and argued with defense counsel, cross-examined and led some witnesses, and provided

guidance to the prosecutor in presenting evidence". Ingram v. State, 134 Ga. App. 935 @ 939 (1975). Yet that Court let Petitioner's conviction stand undisturbed. The following is a partial display of the Trial Judge's actions:

(T-25) The Court overrules repeated objection to general term, "they", "them", used by witness Dorminy stressing contention of conspiracy by prosecution despite no proof or groundwork laid for such contention.

(T-35) Instructs Prosecutor on question to be asked witness.

(T-41) Court assists Prosecutor in laying foundation for introduction of photographs.

(T-52) Court questions witness Dorminy during cross-examination by

Ingram's Counsel on use of drugs. (T-117) Court advises Director Hicks as to import of question implying Ingram during questioning may have "volunteered" answers. Witness immediately (without further question) states, "He volunteered them." Note: Hicks was an expert police witness! (T-119) Court admonishes Prosecutor for not asking question as told by the Court. (T-117).

(T-138) Court emphasizes testimony of Director Hicks that at the time Ingram went to Police Headquarters he went voluntarily and was not under arrest. (T-179) Here the Trial Judge revoked the Appearance Bonds of Ingram and Riggins. No explanation or reason given. Ingram was in the U. S. Army

stationed at Fort Benning and no risk of non-appearance was apparent. (T-298-299) (T-184).

(T-184) Court advises Prosecutor no foundation has been laid when asked by Prosecutor "can we offer this statement your Honor."

(T-187) Court gratuitously advises Director Hicks he can use his notes to refresh his memory re: statement of Ingram if he prepared them.

(T-187, 188) Despite Court's advice no foundation was laid for introduction of statement to show it was voluntary, Court puts on defense the burden to show the challenged statement was voluntary.

(T-189) Although Director Hicks omitted one essential from warning to Defendant

Ingram, Court advises he does not have to tell defendant he can cease talking at any time and ask for counsel. Note: The Court in its own ruling on the voluntary nature of the statement included this essential. (T-178)! (T-190) Here Court leads Director Hicks to include the essential clause that "he can cease talking at any time" during the interrogation and does it twice.

(T-191) When Counsel for Ingram was about to move for mistrial he was interrupted by the Court, his Motion cut off, whatever he was going to do was prevented by the Court, and Counsel was told in effect to "take it up with the Court of Appeals." (T-192) Trial Court in effect restricts

cross-examination of Director Hicks and states, "I assume that Detective Hicks knows what he said yesterday and if it is the truth will say it again". This might be another way of advising the witness to be careful. (T-197) Court interrupts crucial questioning of Detective Hicks as to whether he had reason to suspect Ingram "prior to going to his house" because a phone call tip had made reference to Ingram, and elicits answer that the witness did not know of the phone call prior to the visit to Ingram. Note: Hicks had been a police officer fifteen years (T-116) and was a Department Director, in other words an expert witness. Even so at the same point in the Record, Hicks admitted he

knew of the phone call before this visit.

(T-200) Court permitted, in fact insisted, Hicks be allowed to give an answer not responsive to the question asked by Counsel for Ingram. Note: The Court later admits error may have been committed in this regard. (T-202).

(T-216) The Court at a critical stage in the questioning of Hicks as to when he first advised Ingram of his rights interrupts as Counsel was trying to pin-point answers of witness.

(T-251) The Court attempts to ensnare the witness Ingram into admitting he was told prior to any statement that he could have a lawyer. Note: Ingram

stated under oath he was never given any warning of his rights until 11:30 on the night of his arrest when he was handed a warrant. (T-248, 249).

(T-253) Court questions Hicks to make it clear Ingram understood the warning allegedly given him, an ingredient overlooked by the Prosecutor.

(T-253) Court questions Hicks to draw out contradiction of Ingram as to request for a lawyer.

(T-299) The Court points out to the jury that Ingram and Riggins are "prisoners and on trial although free since February 1974". This statement and the fact of revocation could have but one implication to the Jury; namely, that the Court felt

these defendants guilty and dangerous. (T-318-319) At a critical point in the identification of Ingram as an alleged seller of products of the alleged robbery, when the Prosecutor was having trouble with the witness (Harris), the Court interposed its questions and assisted the Prosecutor, then denied a mistrial Motion on account of the Prosecutor's actions based on its following question to the witness. The import of this interposition cannot be overestimated, and counsel for Ingram moved here for a mistrial because of the Court's action. Denied. (T-321) Again the Court questions witness (Harris) to bring out an essential point.

(T-323) Court has another defendant identified by its question.

(T-329) The Court without any preliminary objection by the Prosecutor takes issue with Counsel for Ingram and engages in rather heated exchange.

(T-359) When the Prosecutor commented on failure of defendants to present evidence as an indication of guilt the Court reformed the remarks and asked the Prosecutor if he did not agree.

(T-361) The Court in front of the jury upheld the Prosecutor's remarks and stated "If you (Counsel) believed they were innocent, yes sir, he has a right to deduct that" although he had just (T-360) ruled that this could not be done since the defendants were presumed innocent. In other words, he placed a

burden on defendants which the law holds is not be be so placed. (T-362) Court reminds jury of its long experience as a Prosecutor! (T-379) Here the Court sua sponte re-emphasized to the Jury the fact that they can bring in a verdict of Robbery by Intimidation, although he had covered the same thoroughly in his original charge. (T-373) If this constituted a suggestion to the jury they certainly followed it, and perhaps impressed by the term "lesser" recommended leniency which recommendation, however, the Court ignored.

These examples show how Petitioner was denied a fair trial. The Trial Judge remarked during the trial thathe had been a prosecutor for ten years (T-362), but the

roles of prosecutor and judge are much different. An accused is entitled to be tried by an impartial and fair judge, who shall maintain his role of judge and not assume that of prosecutor. U. S. v. Domres, 142 F 2d 477 (CCA Wis., 1944); cert. denied 323 U.S. 723. Here, the Trial Judge did assume the role of prosecutor and prejudiced the minds of the jury in so doing.

The Fifth and Fourteenth Amendments' requirements of due process demand that an accused be awarded a fair trial before an impartial judge. U. S. v. Meyer, 462 F. 2d 827 (1972), on remand 346 F Supp 973; U. S. v. Keane, 375 F Supp 1201 (1974). These requirements were not met in Petitioner's trial. It has also been held that the cumulative effect of a trial judge's constant and extensive questions asked of

witnesses and his occasional remarks tending to ridicule defendant and to infer that the judge believed defendant was guilty destroyed the atmosphere of impartiality and denied the defendant of a fair and impartial trial. U. S. v. Fry, 304 F 2d 296 (C. A. Wis. 1962).

Petitioner contends that the partiality of the Trial Judge denied him a fair trial and respectfully requests that this Court grant his Application for a Writ of Certiorari for that reason.

II. PETITIONER'S CONSTITUTIONAL RIGHTS AS GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE U. S. CONSTITUTION WERE DENIED BY THE TRIAL COURT IN ALLOWING THE STATE TO TRY PETITIONER FOR CONSPIRACY WITHOUT INFORMING PETITIONER OF SUCH PRIOR TO

TRIAL, AND IN CHARGING THE JURY ON THE LAW OF CONSPIRACY.

The Petitioner was not indicted or charged with the crime of "conspiracy".

During the trial, the Prosecutor opened his case by infomming the Jury that he was going to prove that a conspiracy had existed between Petitioner and his two co-defendants. (T-13) Despite vigorous objections by Petitioner's Counsel (T-13, 14), the Trial Judge allowed the Prosecutor to repeatedly plant the thought of conspiracy in the Jury's mind. This was accomplished by the Prosecutor and his witnesses who used the subtle innuendo "they", at least fifteen times during the trial. (T-21, 22, 24, 25, 27, 28, 29, 31, 32, 34, 35, 38, 59, 60, 66).

Despite the failure of the Prosecutor

to ever prove that a conspiracy existed, the Trial Judge gave a lengthy charge on the same (T-371, 372), and the Court of Appeals of Georgia upheld the Trial Judge. Ingram v. State, 134 Georgia Appeals 935 @ 937 (1975).

In so doing, the Court of Appeals of Georgia cited Bruster v. State, 228 Georgia 651(3), 187 SE 2d 297 (1972) and Scott v. State 229 Georgia 541, 192 SE 2d 367 (1972) for the proposition that a conspiracy may be proved and the law concerning conspiracy may be charged by the Trial Court despite the fact that the Petitioner was never notified (by way of indictment or otherwise) that he was so accused.

The Petitioner contends that the decision of the Court of Appeals and Supreme Court of Georgia is contrary to the Constitution of the United States. Petitioner's contention

is founded on the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

A. SIXTH AMENDMENT GROUNDS

In part, the Sixth Amendment reads that:

> In all criminal prosecutions, the accused shall enjoy the right to . . . . be informed of the nature and cause of the accusation . . . . . .

The Sixth Amendment, as it applies to the right to jury trial and the right to counsel, has long since been held to apply to the states through the catalyst of the Fourteenth Amendment. Duncan v. Louisiana, 391 U.S. 145 (1968); Gideon v. Wainwright, supra; Argersinger v. Hamlin, 407 U.S. 25, 92 S. Ct. 2006 (1972).

In Argersinger v. Hamlin, supra, (which is primarily thought of as clarifying

Gideon, supra, by holding that a state defendant's right to counsel "in criminal cases" includes cases of misdemeanors as well as felonies) this Court also held that: "Another guarantee (of the Sixth Amendment applicable to the States) is the right to be informed of the nature and cause of the accusation." 405 U. S. 25 @ 28.

This was not accomplished in Petitioner's trial. He was never informed through any means (indictment, information, etc.) prior to the Prosecutor's opening statement that the State of Georgia was contending that he conspired with his co-defendants in the commission of several crimes. (T-13-14; 26).

No wonder the Prosecutor and the Trial Judge didn't want . . "to put the defendants through the ordeal of separate trials" . . (T-7). In retrospect, the Prosecutor's

strategy was foolproof; i.e., never mention conspiracy until the trial begins (T-13); insist on trying Petitioner together with his co-defendants (T-5, T-3-8); and continually mention, or have his witnesses use the word "they".

Criminal trials of this type should not be permitted anywhere and they have been expressly outlawed by the Sixth Amendment. Therefore, Petitioner requests that this Court grant this his Application for a Writ of Certiorari on the ground that his Sixth Amendment rights to be informed of the nature of the accusation against him was abrogated by decisions of the Supreme Court of Georgia; namely, Bruster v. State, supra, and Scott v. State, supra, which are contrary to this Court's holding in Argersinger v. Hamlin, supra.

B. FOURTEENTH AMENDMENT GROUNDS

The first Section of the Fourteenth Amendment states:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . .

This "due process" clause was used by this Court as early as 1948, in In Re Oliver, 335 U. S. 257, 68 S. Ct 499, where it was held that a person's right to reasonable notice of a charge against his is basic in our system of jurisprudence.

A criminal defendant has reasonable notice as required by "due process" when he has been "fairly apprised" of the charges against him. Frisbie v. Collins, 342 U.S. 519, 72 S. Ct 509, rehearing denied 343 U.S. 937, 72 S. Ct 768 (1952).

Not only must reasonable notice be given of charges which a criminal defendant faces, but the notice must be of the specific charges involved. Cole v. State of Arkansas, 333 U.S. 196, 68 S. Ct 514 (1948). This specificity is required so that an accused will not be taken by surprise by evidence offered at his trial. People v. Hirst, 106 Cal. Rptr 815, 31 C. A. 3d 75 (1973).

Due process requirements of the Fourteenth Amendment were not met in the case at Bar. Petitioner was never notified or "fairly apprised" of the specific charge of conspiracy being made against him until trial, which amounted to the unfair element of surprise in the state's case against him.

For the above reasons, Petitioner argues that the Georgia cases of Bruster v. State, supra, and Scott v. State, supra,

are in direct violation of the Fourteenth Amendment to the Constitution of the United States and for that reason contends that his Application for a Writ of Certiorari should be granted.

C. FIFTH AMENDMENT GROUNDS

Relating to indictment, the Fifth Amendment states that:

> No person shall be held
> to answer for a capital,
> or otherwise infamous crime,
> unless on a presentment or
> indictment of a Grand Jury, .

As the Court is well aware, the self-incrimination clause of the Fifth Amendment was held to be protected by the Fourteenth Amendment against abridgement by the States in 1964. Mallory v. Hogan, 378 U.S. 1, 84 S. Ct 1489 (1964).

To date, the indictment provision of the Fifth Amendment has not been held to be applicable to the States. Michel v. State of Louisiana, 350 U.S. 91, 76 S. Ct 158, rehearing denied 350 U.S. 955, 76 S. Ct. 340 (1955). It has been held, however, that in a state criminal action indictments are not required under this provision of the Fifth Amendment where an information procedure is used by the state. Gasaway v. Page, 303 F Supp 491 (D. C. Okl., 1969).

To insure justice any criminal defendant, state or federal, must be apprised of what the State or Federal Government alleges he is guilty of doing. The chief purposes of an indictment are to inform a defendant of the specific charges against him, so that he may adequately prepare his defense, and to describe the activity with sufficient

specificity to enable him to protect against future jeopardy for the same offense. Gaither v. U. S., 413 F 2d 1061, 134 U.S. App. D. C. 154 (1969). Petitioner was not so informed.

With the Fifth Amendment's provisions relating to indictments not being applicable to states, trials still result in state prosecutors using surprise tactics, as in Petitioner's case. What good is the Constitution of the United States if it does not protect the citizens of its land? The Fifth Amendment does not say that it applies only to federal defendants; nor does it say that its indictment clause refers only to federal defendants, whereas other provisions refer to both federal and state defendants.

When you're seated in the courtroom as a criminal defendant, neither the fundamental

rights theory, the total incorporation theory, nor the selective incorporation theory makes any sense. All the defendant is aware of is that the Prosecutor is alleging that the defendant did something that he is not even charged with having done. The fact that the Prosecutor skillfully labels the allegation as the "theory of conspiracy" is of no practical consequence to the defendant.

Furthermore, Petitioner contends that by not formally charging or indicting him with the offense of conspiracy the State of Georgia violated the Fifth Amendment's guarantee against double jeopardy. The said clause reads:

> . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb.

The State of Georgia could, if it so desired, bring Petitioner to trial for conspiracy to commit the two crimes of which he was acquitted and even the one of which he was found guilty. This is precisely what the above clause prohibits.

The Fifth Amendment's double jeopardy clause has been held to apply to the states through the due process clause of the Fourteenth Amendment. Thames v. Commonwealth, 312 N.E. 2d 569 (Mass. 1974); Jarrell v. State, 510 P. 2d 127 (Kan. 1973).

This Court is the only body which can correct this type of unfairness. Petitioner respectfully requests that this Court grant his Application for a Writ of Certiorari on the ground that the indictment provision of the Fifth Amendment should be made applicable, retroactively to the time of this case, to the States

thereby protecting Petitioner's right to have been informed of all charges against him prior to trial, and on the ground that his guarantee against double jeopardy from the Fifth Amendment has been violated by the State of Georgia.

III. PETITIONER'S CONSTITUTIONAL RIGHTS AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE U. S. CONSTITUTION WERE DENIED IN THE TRIAL COURT BY THE DENIAL OF PETITIONER'S MOTION TO SEVER, FORCING PETITIONER TO STAND TRIAL WITH TWO OTHER DEFENDANTS.

At the trial's outset, Petitioner presented his Motion for Severance of Counts and of Defendants. (T-3-T-7). Petitioner's Motion for Severance of Defendants was based on the fact that the Prosecutor intended to introduce a statement by a

co-defendant to implicate Petitioner in the commission of the alleged crimes and that since Petitioner had no way of knowing whether the said co-defendant would take the stand to testify, the Petitioner's right to confrontation with such co-defendant would be denied. (T-3-4).

Petitioner raised the point in support of his Motion for Severance of Counts that he was indicted on two separate indictments one charging him with the offense of murder and armed robbery and the other charging him with the offense of aggravated assault. (T-6).

Georgia Code Annotated Section 26-506(c) provides the applicable law whereby:

> When two or more crimes are charged . . . the Court in the interest

> of justice may order that one or more of such charges be tried separately. (Emphasis Added).

The trial court's response to Petitioner's motion was:

> We don't want to put the Defendants through the ordeal of separate trials - - - (T-7).

Petitioner contends that even though the trial judge is given unlimited discretion (in the interest of justice) in deciding whether to sever different crimes at trial (Georgia Code Annotated Section 26-506 (c)), he is not given any such discretion as to the severance of more than one defendant on trial. There is no Georgia Statute which addresses itself to severance of co-defendants.

Petitioner contends that since no Georgia Statute exists covering the matter, Petitioner

had a fundamental right to a separate trial and the Trial Judge should have granted Petitioner's Motion for Severance based on the Sixth and Fourteenth Amendments to the Constitution of the United States.

Basically, the Sixth Amendments guarantee of a criminal defendant being confronted with the witnesses against him should have controlled the said court's ruling on severance. The "right of confrontation" means that the right of an accused to hear witnesses testify against him and to cross-examine them. U. S. v. Barracuta, 45 F. Supp 38 (D. C. NY 1942). This Sixth Amendment guarantee should be made applicable to the case at Bar.

Moreover, Petitioner respectfully contends that the Fourteenth Amendment due process clause should also control as to this severance issue. Where rules of state practice and

procedure conflict with the due process clause of the Fourteenth Amendment, they must yield to the commandments of the Amendment. Nelson v. State, 278 So 2d 734 (Ala. Cr. App., 1973). As is evident, such conflict existed in the trial of the case at Bar.

Referring to a trial of several co-defendants, it has been held that a single joint trial of several defendants may not be had at the expense of a defendant's right to a fundamentally fair trial. U. S. v. Echeles, 352 F 2d 892 (C.A. Ill. 1965). Further, in U. S. v. Elliott, 418 F 2d 219 (C. A. Nev. 1969), it was held that a joint trial of co-defendants may in some cases be fatally prejudicial, as when a confession by one defendant is introduced against another defendant through the testimony of a third party.

Petitioner shows that the example in the Elliott case, supra, is exactly what happened in this trial. A police detective read a co-defendant's confession into the evidence at the trial. (T-304-308). The transcript of this confession shows the prejudicial nature of this testimony. (T-304-308).

The Petitioner, sitting at the defense table with two other defendants and five attorneys, could not escape the prejudice created in the minds of the jury after the reading of that confession. References to "he", and "the subjects" and "they" in the confession did not save the Petitioner from bias on the part of the jury - - and no instructions from the Trial Judge could have rectified what had taken place. (T-308-309).

The Court of Appeals of Georgia stated

with reference to the issue of severance, that:

> Here Ingram (the Petitioner) has not shown an antagonistic defense. Since it is a matter of discretion, and the appellant (Petitioner herein) has not shown prejudice, this enumeration is without merit. Ingram v. State, 134 Ga. App. 935, @ 937 (1975).

The Petitioner contends that the showing of prejudice is obvious from the reading of his co-defendant's statement. (T-304-308). Petitioner pointed out to the Trial Court this very same reason in his Motion for Severance from the other defendants. (T-3-4). Further, the State's repeated references to "they" (T-21, 22, 23 24, 25, 27, 28, 29, 31, 32, 34, 35, 38, 59, 60, 66) during the trial, with

Petitioner seated with the other two defendants added to the blatant unfairness and prejudicial nature of this trial.

In view of the guarantees of the Sixth and Fourteenth Amendments of the United States Constitution relating to confrontation and due process of law, and the cited case law, Petitioner respectfully contends that his Application for a Writ of Certiorari be granted.

IV. PETITIONER'S CONSTITUTIONAL RIGHTS AS GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE U. S. CONSTITUTION WERE DENIED BY THE TRIAL COURT IN ALLOWING THE INTRODUCTION OF THE STATEMENT OF THE PETITIONER INTO EVIDENCE.

Escobedo v. Illinois, 378 U. S. 478 (1964), held that in a state criminal matter

if certain conditions were present during questioning prior to indictment and the right to counsel was not accorded a defendant, then any statement made by such defendant would be deemed involuntary and inadmissible. Thos conditions were:

1. That the investigation was no longer general but had focused on certain suspects including this particular suspect.
2. The purpose of questioning this suspect was to obtain an incriminating statement.
3. Counsel was requested and denied.
4. This suspect was ineffectively warned of his right to remain silent.
5. This suspect was in custody.

Petitioner shows this Court that the preceding conditions were present in the case at Bar, in that:

1. The investigation had focused on Petitioner and other suspects. The detectives knew one Harvey King was involved because he had been identified from a photograph. On the afternoon of February 20, 1974, before picking up Petitioner at his home, the detectives called Huntsville, Alabama, trying to locate King's brother but instead reached King's sister-in-law, a Mrs. Bastick. (T-231) The detectives learned from her that King was in Nashville, Tennessee. Prior to going to Petitioner's home on February 21, 1974, the detectives

learned from Harvey King, in a call from Nashville, that Petitioner was involved. (T-235)

2. The questioning of Petitioner was meant to elicit an incriminating statement. Petitioner was interrogated from about 5:30 P.M. on February 21, 1974 (T-165) until at least 11:30 P.M., February 21, 1974, (T-176) or probably more accurately until 12:30 or 1:00 A.M. on February 22, 1974. (T-159) Immediately after he admitted knowing Harvey King (T-124), one of the detective, Mr. Bettis, began to give Petitioner his constitutional rights there in his home, only to be stopped abruptly by his superior, Mr. Hicks. (T-136, 172).

Petitioner was asked to go to headquarters because there was a typewriter there for typing statements (T-144), even though the detectives had taken statements in longhand before (T-149), and even though both detectives had paper and pencil with them. (T-207, 223, 224). Petitioner was kept in an eight by ten foot room at headquarters with the detectives (T-130) while the interrogation continued.

3. Counsel was requested by Petitioner on several occasions, and his request was denied by the police. (T-172, 173, 174).

4. Petitioner was not properly, if at all, warned of his right to

remain silent. He was not advised of his right to remain silent before the police skillfully elicited an incriminating statement from him. (T-188). Petitioner was not even properly warned after the police advised him of his rights. (T-189).

5. Petitioner was in custody from the time the detectives arrived at his home at about 5:30 on February 21, 1974. Since one detective started to advise him of his rights at his home (T-136, 172) surely the detective knew Petitioner was in custody. A suspect may be in custody

although still with police at his house. Orozco v. Texas 394 U. S. 324 (1969).

Petitioner further contends that Miranda v. Arizona, 384 U.S. 436 (1966), applies to his case. The guidelines as to advising a suspect of his constitutional rights were not met prior to Petitioner's statement. (T-176-177).

Mallory v. U. S., 354 U.S. 449 (1957), also applies to the case at Bar. In Mallory it appeared that the suspect was questioned from three o'clock in the afternoon until ten o'clock that night when a statement was secured from him. This Court held that questioning over that period of time invalidated the statement. In the case at Bar the Petitioner was interrogated for over six hours - closer to seven according to Detective Bettis. (T-159).

The theory behind Mallory, supra, is similar to that of Wong Sun v. U. S., 371 U.S. 471 (1963). The "fruit of the poisonous tree" doctrine of Wong Sun means that any secondary evidence is tainted by the initial illegality unless the police can show some independent basis for the secondary information. Applying this to Petitioner's case, any statement obtained from Petitioner subsequent to the police illegally eliciting the statement that he was at the scene on the night in question should have been excluded from the evidence at trial.

For the above reasons, Petitioner contends that Escobedo, supra, Miranda, supra, Mallory, supra, and Wong Sun, supra, involving as they do the Fifth, Sixth and Fourteenth Amendments to the U. S. Constitution apply to the case at Bar and show

that the admission of Petitioner's statement into evidence by the trial court was error. Therefore, Petitioner respectfully requests that this Court grant his Application for a Writ of Certiorari.

V. PETITIONER'S CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW ACCORDED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE U. S. CONSTITUTION WERE DENIED BY THE TRIAL JUDGE WHEN HE REGARDED RUMOR AND HEARSAY DURING PETITIONER'S SENTENCING.

The pre-sentence hearing for Petitioner was held on July 12, 1974. (T-405). During that hearing, after remarks by counsel for Petitioner and Counsel for a co-defendant, the Trial Judge said:

> "I've heard what Mr. McCauley and Mr. Swearingen said about them and about their attitude, but I

can't overlook the fact that the Sheriff's Deputies constantly reported that their attitude during this trial wasn't that good. Said it was one of mockery and defiance and was not commendable at all. The Deputies reported that on them constantly, all three of them. Even this young man here in the green coat had some remarks to make to one of the ladies in the District Attorney's office down there about, you can go with me anytime, baby, if you want to - - or something to that effect. You remember that, don't you?

The Defendant: No sir, I don't.

The Court: Wasn't he the one, Mr. Conger (the Prosecutor)?

Mr. Conger: According to one of

our secretaries, yes, sir.

The Court: Yes. And so, they're not the lily-white, pure people that I think these people who are here for them think they are. (T-415-416).

These improper comments by the Trial Judge showed that he was listening to rumor, hearsay and reports of persons unsworn and unidentified in determining the sentence for Petitioner. Such comments constitute error in light of the Fifth and Fourteenth Amendment guarantees of due process. The sentencing procedure is not immune from scrutiny under the due process clause of the Fifth Amendment, U. S. v. Rao, 296 F. Supp 1145, (D. C. N.Y. 1969); or of the Fourteenth Amendment. Com ex rel. Townsend v. Burke, 63 A. 2d 77, 361 Pa. 35 (1949), cert. denied 340 U.S. 915, 71 S. Ct 286.

Due to the above facts, Petitioner respectfully requests that this Court grant his Application for a Writ of Certiorari.

VI. PETITIONER'S CONSTITUTIONAL RIGHT AGAINST SELF INCIRMINATION AS GUARANTEED BY THE FIFTH AMENDMENT TO THE U. S. CONSTITUTION WAS VIOLATED BY THE PROSECUTOR'S COMMENT ON PETITIONER'S FAILURE TO TESTIFY AT TRIAL.

It is obvious that the misconduct of a prosecutor at trial may deprive an accused of a fair trial. McMullen v. Maxwell, 3 Ohio St 2d 160, 209 N.E. 2d 449 (1965).

During his closing argument the prosecutor made this remark:

> . . . and how many of them got up and told you what their defense was going to be? Don't

you think if they were innocent

. . . ; (objection) (T-359).

After Counsel's objection, the Court stated to the prosecutor:

I think you are allowed to comment on it (failure to make an opening statement) insofar as your conjecture as to what defense they are offering, but not as to innocence or guilt. They are presumed innocent. (T-360).

Despite the Court's admonishment, the prosecutor continued with his closing and said:

. . . but they were afraid that we would pin them down early if they got up and made an opening statement. Now, I'm going to submit to you that if they were truly innocent, that

wouldn't have happened. (Objection) (T-360-361).

Again the Prosecutor commented on Petitioner's innocence, but the Court failed to even instruct the jury to disregard these statements by the Prosecutor.

"Don't you think they were innocent" (T-359) and "if they were truly innocent" (T-361) were indirect attempts by the prosecution to remind the jury that the Petitioner had not taken the stand during his trial. This is in direct violation of the Fifth Amendment's self-incrimination clause. Griffin v. California, 380 U. S. 609, 85 S. Ct 1229 (1965), rehearing denied 381 U. S. 957, 85 S. Ct 1797 (1965).

Since the determination of whether certain comments with respect to petitioner's failure to testify were erroneous must be

made according to federal, and not state standards (Schultz v. Yeager, 293 F. Supp 794 (D. C. N.J. 1967), aff'd 403 F 2d 639, cert. denied 394 U.S. 961, 98 S. Ct 1309), the Petitioner contends that the test that is to be applied as to whether there were comments made by the Prosecutor on the Petitioner's failure to testify is whether the language used was manifestly intended or was of such character that the jury would naturally and necessarily take it to be such comment. U. S. v. Tierney, 424 F 2d 643 (C.A. Cal. 1970) cert. denied 400 U. S. 850, 91 S. Ct 53; U. S. v. Lyon, 397 F 2d 505 (C.A. Wis. 1968) cert. denied 393 U.S. 846, 98 S. Ct 131.

Petitioner contends that there was no other way for the jury to take the Prosecutor's comments, except as referring to his failure to testify. For the above

reasons, Petitioner respectfully requests that this Court grant his Application for a Writ of Certiorari.

CONCLUSION

The judgment below represents numerous departures from decisions of this Court regarding criminal procedure in state courts. This Petition for a Writ of Certiorari should therefore be granted.

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IN THE SUPREME COURT OF THE UNITED STATES

NO. _____

WILLIAM HENRY INGRAM,

Petitioner

vs.

THE STATE OF GEORGIA

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

APPENDIX TO THE ABOVE PETITION

VINCENT P. McCAULEY
POST OFFICE BOX 1884
COLUMBUS, GEORGIA 31902
ATTORNEY FOR PETITIONER

IN THE COURT OF APPEALS OF GEORGIA
134 Georgia Appeals 935 (1975)

50305. INGRAM v. THE STATE

MARSHALL, Judge.

Three defendants (Bradley, Riggins and Ingram) were tried jointly for murder, armed robbery and aggravated assault. The jury returned a verdict against Bradley for armed robbery and aggravated assault (no appeal) and against Riggins and Ingram for robbery by intimidation. The trial judge imposed a sentence of ten years each for Riggins (50306), and Ingram (50305). This opinion deals solely with the appeal of Ingram.

Held:

1. The state has filed a motion to dismiss Ingram's appeal for failure of Ingram to timely file the transcript of

the proceedings in the trial below. Ingram was convicted of robbery by intimidation on July 11, 1974, and sentenced to ten years in the penitentiary on July 12th. Notice of appeal was filed on August 1, 1974. The transcript of evidence was not filed until December, 1974. In the trial court the state moved to dismiss the appeal in accordance with Rule 10 (c) of the Court of Appeals, on the ground that the transcript had not been filed within the thirty-day filing period, as required under the Appellate Practice Act of 1965, p. 26 (Code Ann. § 6-806). On September 18, Ingram applied for extension of time to file the transcript nunc pro tunc. The trial court ruled as follows: "In accordance with the rule laid down in McAuliffe vs. Rutledge, 231 Ga. 745, that 'An attorney who through negligence,

ignorance or misrepresentation of the law fails to perform routine duties resulting in a dismissal of his client's appeal, thereby denying such client a right of review after conviction cannot be said to be rendering effective assistance' it is the finding of the Court that Defendant's attorney did not render defendant effective assistance of Counsel and the motion of the State of Georgia to dismiss Defendant's appeal is hereby denied and time for filing the Transcript of Evidence is hereby granted . . ."

In spite of the fact that the rules of Appellate Practice, as set forth in Code Ann. §§ 6-804 and 6-806 have not been complied with in this case, we are nevertheless required to follow the holding in McAuliffe v. Rutledge, 231 Ga. 745 (204 SE2d 141), as did the trial judge, and ignore the rules of appellate practice where

the appeal involves a criminal defendant who has been ineffectively represented by counsel at trial. See also Cunningham v. State, 232 Ga. 416 (207 SE 2d 48). In doing so, we echo the sentiment expressed in Wingo v. State, 133 Ga. App. 385 (210 SE2d 835), and in Duncan v. State, 134Ga. App. 876 (SE2d) (Case # 50403, April 16, 1975). It is apparent that Blackstone v. State, 131 Ga. App. 666 (206 SE2d 553), overlooked in McAuliffe and Wingo, is implicitly overruled by McAuliffe.

2. Ingram enumerates eight errors, the fifth of which involves the question of whether the facts were sufficient to allow a charge of conspiracy when Ingram was not indicted or charged with same.

The evidence at trial showed that Ingram accompanied four other males to the residence

of two victims for the ostensible purpose of purchasing marijuana. Ingram drove the car. During the course of the transaction one of the males pulled out a large pistol, ordered the two victims to lie down on the floor and began beating them with the pistol. Another of the males taped the victims' legs together and another hit one of the victims over the head with a large wine bottle. The males then took stereo equipment and other personal effects from the victims and left in Ingram's car. One of the victims later died as a result of injuries received in the beating. Ingram, in a statement to the police, admitted his presence during the beating and robbery and that he helped dispose of some of the stolen goods, but his defense was that he just happened to be there and that there was no evidence that he

actively or voluntarily participated in the crimes.

This evidence is sufficient to support a charge of conspiracy. A conspiracy may be proved and charged though not alleged in the indictment. Bruster v. State, 228 Ga. 651 (3) (187 SE2d 297) and Scott v. State, 229 Ga. 541 (192 SE2d 367).

"Conspiracy consists in a corrupt agreement between two or more persons to do an unlawful act, the existence of which agreement may be established by direct proof, or by inference, as a deduction from acts and conduct, which discloses a common design on their part to act together for the accomplishment of the unlawful purpose." Fincher v. State, 211 Ga. 89 (4) (84 SE2d 76) (emphasis supplied); Kennemore v. State, 222 Ga. 362 (2) (149 SE2d 791).

3. The first enumeration of error

contends that the trial judge erred in denying Ingram's motion to sever on the ground that conspiracy was not a proper theory of the case and that Ingram anticipated the attempted introduction by the prosecutor of a statement of one of the co-defendants. "Ruling on a motion for severance is a matter committed to the sound discretion of the trial court and in order to obtain a reversal on a severance argument, an appellant must carry the difficult burden of showing that the trial court abused its discretion in denying the severance." United States v. Norman Clark, 480 F2d 1249; see Opper v. United States, 348 U.S. 84, (99 LEd2d 1 01 , 75 SCt. 158). Here Ingram has not shown an antagonistic defense. Since it is a matter of discretion, and the appellant has not shown prejudice, this enumeration is without merit.

4. Ingram complains in enumeration of error 2 that the trial court erred in admitting an incriminating statement which Ingram made to police on the grounds that: (1) at least part of the statement was made while Ingram was under suspicion and in custody and before he was warned of his Miranda rights; (2) he was not advised of his right to stop the questioning at any point during the interrogation. The evidence at both the Jackson v. Denno hearing and before the jury showed that two police detectives called on Ingram at his home to find out some information concerning one Harvey King, a suspect in the case. Ingram stated that he knew King and had gone to Huntsville, Alabama, with him recently. The detectives then asked Ingram to accompany them to headquarters to give them more information concerning King. He went voluntarily and was not placed under

arrest. At police headquarters Ingram asked why they were looking for King. The policeman responded "I told him, I have a warrant for Harvey King for murder and armed robbery. At this point he became extremely nervous. He started twisting his hands and began sweating. And I asked him, I said, do you know anything about this? and he said yes - - " At this point the policeman interrupted Ingram and advised him of his rights under Miranda v. Arizona, 384 U.S. 436 (86 SCt. 1602, 16 LEd2d 694). The detective's testimony was that they did not suspect Ingram until this time and that their sole purpose in talking to him was to discover the whereabouts of King. "The mandates of the Miranda case apply to in-custody interrogation, not to pre-custodial questioning, as here." Kemp v. State, 227 Ga. 251, 252 (179 SE2d 920).

See also Estes v. State, 232 Ga. 703 (4a) (208 SE2d 806); Jones v. State, 127 Ga. App. 137 (4) (193 SE2d 38); Boorstine v. State, 126 Ga. App. 90 (1) (190 SE2d 83); Ingle v. State, 123 Ga. App. 56 (179 SE2d 305).

That the advice given did not include advice that Ingram could stop the questioning at any time during the interrogation and remain silent or request the presence of an attorney is not a requirement under the Miranda case. Williams v. State, 132 Ga. App. 152 (4) (207 SE2d 651). The statement made by Ingram was by a preponderance of the evidence, otherwise voluntarily made. Lego v. Twoney, 404 U.S. 477 (30 LEd2d 618, 92 SCt. 619); Smith v. State, 218 Ga. 216 (5) (126 SE2d 789); Brown v. State, 203 Ga. 218 (2) (46 SE2d 160).

5. In the third enumeration of error, Ingram complains that the trial court erred

in failing to exclude prosecution exhibit number four (a stereo speaker) because of lack of identification, and that without this evidence there is insufficient proof of robbery by intimidation. Even if the identification of the speaker by the witness were not proven beyond a reasonable doubt (Jones v. State, 106 Ga. App. 636 (5) (127 SE2d 855); Cowart v. State, 75 Ga. App. 333 (43 SE2d 506)), Ingram could not have been harmed thereby because there was sufficient evidence to otherwise establish appellant's complicity in the offense of robbery by intimidation.

6. The fourth enumeration of error contends that because the surviving witness could not positively identify Ingram as a participant in the crime there remained no corroboration to Ingram's incriminating statement and the evidence was therefore insufficient to prove

his guilt. In addition to the corpus delicti, there was another witness who identified Ingram as being one of the persons who presented the stereo equipment for sale to him after the crime. There was sufficient corroboration.

7. The sixth enumeration of error complains that the trial judge left his position of impartiality during the trial, which resulted in an unfair trial for Ingram. We have read the transcript and conclude that, even though the trial judge interrupted and argued with defense counsel, cross examined and led some witnesses, and provided guidance to the prosecutor in presenting evidence, he did not leave his position of impartiality to the extent that an unfair trial resulted. Wilson v. State, 229 Ga. 224 (2) (190 SE2d 78). Cf Dunn v. State, 123 Ga. App. 607.

Code of Judicial Conduct, Canon 3 A (3), 231 Ga. A-3.

8. Ingram's seventh enumeration of error is that the trial court erred in considering rumors and innuendoes during the sentencing phase of the trial. Specifically, during the sentencing phase the trial court heard argument from the appellant's counsel and then remarked "But I can't overlook the fact that the Sheriff's deputies constantly reported that their (the appellant's) attitude during this trial wasn't that good, said it was one of mockery and defiance and was not commendable at all. The deputies reported this on them constantly, all three of them. Even this young man here in the green coat (Riggins) had some remarks to make to one of the ladies in the District Attorney's office down there about, you can

go with me any time, baby, if you want to - or something to that effect . . . and so, they are not the lily-white pure people that I think these people who are here with them think they are."

Ga. L. 1974, pp. 357, 358 (Code Ann. § 27-2503) provides in part, that during the sentencing phase, "that only such evidence in aggravation as the state has made known to the defendant prior to his trial shall be admissible." We are aware of no appellate decisions defining the meaning of "evidence" as used in this statute. We do not think that the conduct and attitude of the defendant personally observed by the judge during the trial would come within the restriction of said statute. However, for the judge to reply on information that is not his own personal observation is

improper, and such practice is specifically disapproved. Nevertheless, there is a presumption, in the absence of a strong showing to the contrary, that the trial judge, when sitting without a jury, separates the legal evidence from facts not properly in evidence in reaching his decision. McBryde v. State, 34 Ga. 202, 204; and for this reason we find no error in this enumeration. See Jones v. State, 233 Ga. 662 (3) (212 SE2d 832).

9. Ingram's final enumeration of error was the trial court's failure to sustain the defense's objection to the closing arguments of the prosecutor. Specifically, the remark objected to was: "And how many of them got up and told you what their defense was going to be? Don't you think if they were innocent - (Objection) . . ." And later, the prosecutor remarked, "But they were afraid that they

would pin them down early if they got up and made an opening statement. Now, I am going to submit to you that if they were truly innocent, that wouldn't have happened." Ingram's objection to these remarks by the prosecutor at the trial was that it was improper for the district attorney to comment on the defense attorney's failure to make an opening statement. We are aware of no cases wherein comment on the mere failure of the defense attorney to disclose their theory of defense at the outset of the trial results in prejudice to the accused. The comments come close to but do not amount to a comment on the failure of Ingram to testify, which would constitute reversible error under Griffin v. California, 380 U.S. 609 (S SCt. 1229, 14 LEd 2d 106); Salisbury v. State, 221 Ga. 718 (5) (146 SE2d 776); Spann v. State, 126 Ga.

App. 370 (190 SE2d 924); White v. State, 118 Ga. App. 515 (2) (164 SE2d 158). However, in this case it is clear that the prosecutor's comment was directed to the failure to make an opening statement and there was "no direct reference to the failure on the part of the defendant to testify or make an unsworn statement." Mitchell v. State, 226 Ga. 450, 455 (4) (175 SE2d 545).

Judgment affirmed. Bell, C. J., and Webb, Jr., concur.

COPY BCUND TO

The notification received by the Petitioner from the Court of Appeals of Georgia denying Petitioner's Motion for Re-Hearing therein, dated June 4, 1975, read as follows:

COURT OF APPEALS OF GEORGIA
CLERK'S OFFICE
433 State Judicial Building
Atlanta, Georgia 30334

No.

5. W. H. Ingram v. The State.

The Motion for Rehearing in the above case was
d today, June 4, 1975.

Morgan Thomas, Clerk
Tel. 656-3450

CLOSE IN CENTER POOR COPY

The notification received by the Petitioner from the Supreme Court of Georgia denying Petitioner's Application for a Writ of Certiorari therein, dated September 17, 1975, read as follows:

CLERK'S OFFICE, SUPREME COURT OF GEORGIA

Atlanta 9-17-75

Dear Sir:

Case No. 30227. Seymour v. State

The Supreme Court today denied the writ of certiorari in this case.

9/17/75

Very truly yours,

MRS. JOLINE B. WILLIAMS, Clerk

The notification received by the Petitioner from the Supreme Court of Georgia denying Petitioner's Motion for Re-Hearing on his Application for a Writ of Certiorari, dated September 30, 1975, read as follows:

C[illegible]k's Office, Supreme Court Georgia

DEAR SIR: ATLANTA 9/30/75

The motion for a rehearing was denied today: In consideration

Case No. 30227, Brown v. The State

Yours very truly,

MRS. JOLINE B. WILLIAMS, Clerk

(a

Georgia Code Annotated, Section 26-506 (a), (b) and (c) read:

(a) When the same conduct of an accused may establish the commission of more than one crime, the accused may be prosecuted for each crime. He may not, however, be convicted of more than one crime if (1) one crime is included in the other, or (2) the crimes differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct.

(b) If the several crimes arising from the same conduct are known to the proper prosecuting officer at the time of commencing the prosecution and

POOR COPY

are within the jurisdiction of a single court, they must be prosecuted in a single prosecution except as provided in subsection (c).

(c) When two or more crimes are charged as required by subsection (b), the court in the interest of justice may order that one or more of such charges be tried separately.

Georgia Code Annotated, Section 27-2101 reads:

> When two or more defendants are jointly indicted for a capital offense, any defendant so electing shall be separately tried unless the State shall waive the death penalty; when indicted for a capital felony when the death penalty is waived or for a felony less than capital, or for a misdemeanor, defendants may be tried jointly or separately in the discretion of the trial court; in any event either defendant may testify for the other or on behalf of the State. When separate trials are ordered in any case, the defendants shall be tried in the order requested by the State. If the offense requires

joint action and concurrence of two or more persons, acquittal or conviction of one shall not operate as acquittal or conviction of others not tried. When two or more defendants shall be entitled to the same number of strikes as a single defendant if tried separately. Said strikes shall be exercised jointly by the defendants or shall be apportioned among the defendants in the manner the court shall direct. In the event two or more defendants are tried jointly, the court, upon request of defendants, acting in its sole discretion, may allow an equal number of additional strikes, not to exceed five each, to the defendants as the court shall deem necessary to the ends that justice may prevail.

Georgia Code Annotated Section 27-2503

(a) reads:

(a) Except in cases in which the death penalty may be imposed, upon the return of a verdict of "guilty" by the jury in any felony case, the judge shall dismiss the jury and shall conduct a presentence hearing at which the only issue shall be the determination of punishment to be imposed. In such hearing the judge shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defenant, or the absence of any prior conviction and pleas: Provided, however, that only such

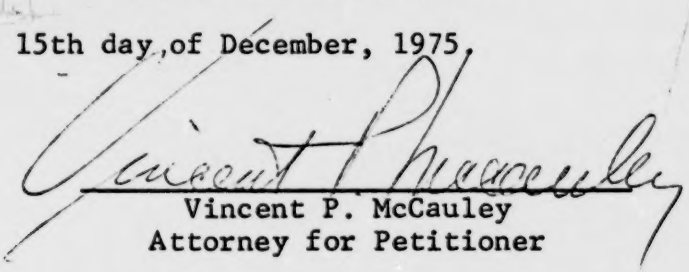
evidence in aggravation as the State has made known to the defendant prior to his trial shall be admissible. The judge shall also hear argument by the defendant or his counsel and the prosecuting attorney, as provided by law, regarding the punishment to be imposed. The prosecuting attorney shall open and the defendant shall conclude the argument. In cases in which the death penalty may be imposed, the judge when sitting without a jury shall follow the additional procedure provided in section 27-2534.1. Upon the conclusion of the evidence and arguments the judge shall impose the sentence or shall recess the trial for the purpose of taking the sentence to be imposed under advisement. The

judge shall fix a sentence within the limits prescribed by law. If the trial court is reversed on appeal because of error only in the pre-sentence hearing, the new trial which may be ordered shall apply only to the issue of punishment.

CERTIFICATE OF SERVICE

I, Vincent P. McCauley, certify that I am the Attorney for the Petitioner in the above and foregoing cause, and also certify that I have served three (3) copies of the above Petition and Appendix upon the Honorable E. Mullins Whisnant, District Attorney, and the Honorable J. Gray Conger, Assistant District Attorney of the Chattahoochee Judicial Circuit, Government Center, Columbus, Georgia, by properly hand-delivering the same at the above address.

This 15th day of December, 1975.



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